



## Aviation Security Amendment Bill 2004

Angus Martyn  
Law and Bills Digest Section

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## Aviation Security Amendment Bill 2004

**Date Introduced:** 17 November 2004

**House:** Senate

**Portfolio:** Transport and Regional Services

**Commencement:** Sections 1 to 3, and item 3 of Schedule 2, commence on Royal Assent. The operative parts of the Bill (Schedules 1 and items 1-2 of Schedule 2) only commence once *both* Royal Assent has been given and the operative parts of the *Aviation Transport Security Act 2004* have commenced.

### Purpose

To enable the carrying out of security checks for persons holding prescribed licenses or authorisations issued by the Civil Aviation Safety Authority.

### Background

The Aviation Security Amendment Bill 2004 (the Bill) was first introduced into the 40<sup>th</sup> Parliament in August 2004 but was not debated before Parliament was prorogued. The Bill as introduced in the current Parliament contains some relatively minor changes. As a 2004 election commitment, the Government promised an additional \$48 million of funding for regional aviation security, but this is entirely separate to the measures proposed in the Bill.<sup>1</sup>

In March 2003, the Government introduced two Bills into Parliament that were designed to overhaul the aviation security legislative framework, including removing virtually all security matters from the *Air Navigation Act 1920* and the *Air Navigation Regulations 1947*. The main Bill was passed as the *Aviation Transport Security Act 2004* ('the ATS Act') in early 2004. However, the operative parts of the ATS Act have yet to commence, so aviation security is still regulated by the *Air Navigation Act* and regulations.<sup>2</sup> Further background on the legislative aspects of aviation security reform can be found in the [Bills Digest](#) for the ATS Act.<sup>3</sup>

Persons who have access to security restricted areas at airports must hold an Aviation Security Identification Card (ASIC). ASIC matters are currently provided for in Division 7 of Part 7 of the *Air Navigation Regulations 1947*. Under Regulation 90, ASICs cannot be issued to a person who, amongst other things:

- has an adverse criminal record,<sup>4</sup> although the Secretary<sup>5</sup> may grant a special permission to allow an ASIC to be issued
- is considered by the Secretary to 'constitute an threat to aviation security' if he or she held an ASIC, or

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- is an unlawful non-citizen.<sup>6</sup>

ASICs can also be cancelled for the same reasons. It is understood that as of 31 August 2004, all ASIC holders will have been subjected to background checks covering all three of the above matters.<sup>7</sup>

Under the Air Navigation Regulations, a decision to refuse to issue an ASIC or cancel one is reviewable by the Administrative Appeals Tribunal (AAT). A determination by the Secretary that a person constitutes a threat to aviation security is also reviewable, as is the Secretary's decision not to grant a special permission in cases where a person has an adverse criminal record.

In relation to the new ATS Act, sections 35-38 provide that, amongst other things, regulations may set out requirements for the security checking of persons who have access to certain secure areas or zones at airports. In giving the second reading speech for the (then) Bill, the Minister stated:

Changes to the aviation security identification card regime will impose stricter controls upon those with access to security sensitive areas at an airport. The addition of politically motivated violence background checks goes a long way towards preventing potential terrorists from accessing these critical facilities.<sup>8</sup>

Draft regulations supporting the ATS Act were examined by the Senate Rural and Regional Affairs and Transport Committee who reported in December 2003. The report did not make any specific recommendations, nor did it make any comments on the proposed revised ASIC system.<sup>9</sup> As at November 2004, the draft regulations are being revised following a series of stakeholder consultations.<sup>10</sup>

In December 2003, the Government announced a range of additional aviation security measures. In relation to security checks, the Minister said:

Aviation Security Identification Cards (ASICs) currently held by airport employees working in security sensitive areas in Australian airports will now be required for all staff working at airports servicing passenger and freight aircraft.

The background checking process currently conducted for ASIC holders will be extended to cover all pilots and trainee pilots prior to the issuing of new photographic licences by 1 July 2004.<sup>11</sup>

The checking process referred to in the second paragraph of the Minister's statement appears to have been partly implemented through the Air Navigation (Aviation Security Status Checking) Regulations 2004, which came into force on 9 July 2004. These regulations allow background checking to be conducted on applicants for flight crew licences, and allow the Secretary of the Department of Transport and Regional Services (DOTARS) to declare someone as having adverse security status, therefore making them ineligible to apply for a flight crew licence. **However, the Regulations do not cover**

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**persons who already hold such a licence.** These Regulations will presumably be repealed when and if the ATS Act, including amendments proposed by the Bill, and associated regulations come into force.

## Main Provisions

### Schedule 1 – Amendments relating to security status checking

#### Amendments to the *Aviation Transport Security Act 2004*

**Item 2** adds the term ‘security designated authorisation’ into the existing definitions section (section 9) of the ATS Act. However, the meaning of the term is only to be given by regulations. Under the Bill, holders of, or applicants for, such authorisations will be the subject of security status checking.

**Item 4** adds **new Division 9 (sections 74F-74I)** to the ATS Act. **New sections 74G** and **74H** are the key provisions.

**New section 74G** inserts the concept of an ‘adverse aviation security status’ into the ATS Act. Under **new subsection 74G(1)**, it is the DOTARS Secretary<sup>12</sup> who makes a determination of a person’s status, although this function may be assumed by the Civil Aviation Safety Authority (CASA)<sup>13</sup> or a DOTARS SES employee.<sup>14</sup> If such a determination is made, a written copy must be provided both to CASA<sup>15</sup> and the applicant or holder of the security designated authorisation: **new subsection 74G(2)**. If the person holds a security designated authorisation, CASA must then suspend or cancel it: **new paragraph 74G(3)(b)**. If the person is applying for an authorisation, it must be refused: **new paragraph 74G(3)(a)**. Note that a determination made under **new section 74G** would appear to be a legislative instrument as defined in the *Legislative Instruments Act 2003*. This matter is discussed in the concluding comments section of this digest.

In considering the question of a person’s aviation security status, the decision-maker will have access to advice from the Australian Security Intelligence Organisation (ASIO). **New subsection 74G(4)** provides that a decision is ‘prescribed administrative action’ for the purposes of Part IV of the *Australian Security Intelligence Organisation Act 1979* (‘the ASIO Act’). This gives the applicant/holder the right to seek a review of the ASIO advice by the Security Appeals Division of the AAT.<sup>16</sup>

The actual procedure for security status checks, including the matters which the Secretary must consider in determining whether a person has an adverse aviation security status, are to be provided for in regulations: **new section 74H**. Whilst it is understandable matters should be able to be added by regulations, there seems no reason why at least a ‘core’ list of matters cannot be included in the Bill.

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**New paragraph 74H(1)(b)** provides that regulations may specify circumstances in which the Secretary *must* determine that a person has an adverse aviation security status. The Explanatory Memorandum to the Bill comments:

These are likely to include circumstances where a person is an unlawful non-citizen, where a person receives an adverse or qualified security assessment from ASIO or where the person has been convicted of certain prescribed criminal offences. These are likely to include convictions for serious offences such as those contained in Part 2 of the *Crimes (Aviation) Act 1991* and Part 5.3 of the *Criminal Code*.<sup>17</sup>

By comparison, **new paragraph 74H(1)(c)** provides that regulations may specify circumstances in which the Secretary *may* determine that a person has an adverse aviation security status. Again the Explanatory Memorandum comments:

It is envisaged that where a person has a particular criminal history, that the Secretary will have a discretion as to whether to declare the person to have an adverse aviation security status.<sup>18</sup>

**New paragraph 74H(1)(g)** provides that regulations may specify procedures and other matters relating to the issue, suspension or cancellation by CASA of security designated authorisations or the refusal by CASA to issue such authorisations. The Explanatory Memorandum comments:

... this would enable regulations to be made which prevented CASA from issuing a security designated authorisation to a person unless the applicant has been subject to checks by ASIO, DIMIA and the AFP. It would also allow regulations which provided that CASA must cancel a security designated authorisation where it isn't possible to subject the holder to background checking.<sup>19</sup>

No detail is given as to the situations where it might not be possible to subject the authorisation holder to background checking. **New paragraph 74H(1)(h)** provides that regulations may provide that applicants for, or holders of, security designated authorisations may request security status checking be undertaken. **New paragraph 74H(1)(i)** provides that regulations may also specify 'the consequences of a failure' by a holder or applicant to request that such checking be undertaken. There is no elaboration on the rationale for these two provisions, particularly the rather cryptic **new paragraph 74H(1)(i)**. **New paragraph 74H(1)(k)** provides that regulations may also give CASA the function of determining that a person has an adverse security status. Where regulations have been made under **new paragraph 74H(1)(k)**, and are in force, any references to 'the Secretary' in **new sections 74G** and **74H** are to taken to include references to CASA: **new paragraph 74H(2)(a)**.

**New section 74I** provides that Division 9 of Part 4 (ie **new sections 74F-I**) is still to have effect notwithstanding any inconsistency between it and anything in the *Civil Aviation Act 1988* (the CA Act) or its associated regulations. The Explanatory Memorandum suggests

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that an example of such an inconsistency is existing section 18 of the CA Act, which essentially restricts CASA to making decisions on authorisations only on safety grounds.<sup>20</sup>

**Item 5** inserts **new paragraph 126(f)**. This allows a person to seek an AAT review of a decision by the Secretary or CASA to give them an adverse aviation security status. However, **item 5** also specifies by **new subsection 126(1)** that this provision does not permit the AAT to review an adverse or qualified ASIO security assessment other than as provided for in the ASIO Act and the *Administrative Appeals Tribunal Act 1975*.

**Item 6** inserts **new subsection 127(2A)** to allow the Secretary to delegate any of his or her powers under Division 9 above to a CASA officer at the Senior Executive Services level equivalent. As a matter of interest, the August version of the Bill allowed for such powers to be delegated to a member of what was described as the ‘Senior Management Group’ of CASA.

Amendments to the *Civil Aviation Act 1988*

**Items 7-10** make consequential amendments to the CA Act.

**Item 7** amends CASA’s functions to include functions conferred on it under the ATS Act.<sup>21</sup> **Item 8** repeals existing subsection 9(5), which currently states that CASA’s functions do not include aviation security. **Item 9** allows for the making of regulations under the CA Act in order to formulate ‘a scheme in relation to security status checking’. **Item 10** allows for CASA to prescribe fees for its doing of anything under the ATS Act.

## Schedule 2 – Amendments relating to transitional provisions

**Item 2** inserts **new paragraphs 1(2)(ba)** and **(bb)** into Schedule 3 of the *Aviation Transport Security (Consequential Amendments and Transitional Provisions) Act 2004*. This will allow for the making of regulations that will enable airport security, ASIC and international cargo security programs made under the existing Air Navigation Act to continue to be in force as transport security or other programs under the ATS Act.

**Item 3** states that the exercise or purported exercise of power under Regulation 5 of the Air Navigation (Aviation Security Status Checking) Regulations 2004 to determine that a person has an adverse aviation security status is taken for all purposes to be, and is taken for all purposes always to have been, prescribed administrative action for the purposes of Part IV of the ASIO Act. As for **new subsection 74G(4)** discussed above, this gives the applicant or holder the right to seek a review of the ASIO assessment by the Security Appeals Division of the AAT.

## Concluding Comments

The Bill will extend security-related checking to persons who are not required to hold ASICs. Such persons will include pilots and trainee pilots who do not have access to

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officially designated security restricted areas at airports.<sup>22</sup> This seems sensible given that the September 11 2001 attacks in the United States demonstrated that aircraft can be a potent terrorist weapon. As part of this policy change, CASA will for the first time have a role to play in aviation security, rather than just aviation safety. Much of the actual 'content' of the background checking process proposed by this Bill is actually to be determined by regulations – one is the matters which the Secretary must consider in determining whether a person has an adverse aviation security status. Parliament may wish to consider whether it is necessary to leave quite this much to regulations rather than including it in primary legislation.

### Possible effect of the Legislative Instruments Act 2003

The *Legislative Instruments Act 2003* (LIA) comes into effect on 1 January 2005.

Section 7 of the LIA includes a table of instruments that are declared not to be legislative instruments. These instruments are exempted from the requirements of the LIA and do not need to be registered.

Item 1 of section 7 of the LIA provides an exemption from the LIA for:

Instruments (other than regulations and other instruments that, immediately before the commencing day, are disallowable) made under the *Air Navigation Act 1920*, or under the regulations made under that Act, relating to aviation security.

It would seem that in order to ensure that aviation security instruments are exempt from the provisions of the LIA a consequential amendment to the LIA will need to be sought in respect of instruments made under the *Aviation Transport Security Act 2004*.

## Endnotes

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- 1 *Security our Regional Skies* Fact Sheet see [http://www.dotars.gov.au/transsec/Reg\\_Aviation/Reg\\_Fact\\_sheet1.aspx](http://www.dotars.gov.au/transsec/Reg_Aviation/Reg_Fact_sheet1.aspx)
  - 2 Unless amended by subsequent legislation, the operative parts *Aviation Transport Security Act* will come into effect no later than March 2005.
  - 3 <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd023.pdf>
  - 4 The meaning of this is detailed in subclause 90(4).
  - 5 Currently, the Secretary of the Department of Transport and Regional Services.
  - 6 This term has the same meaning as that in section 14 of the *Migration Act 1958*.
  - 7 Personnel communication, DOTARS.

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- 8 The Hon John Anderson MP, *House of Representatives Debates*, 37 March 2003, p. 13749.
- 9 [http://www.aph.gov.au/senate/committee/rrat\\_ctte/aviation03\\_draftreg.report/report.pdf](http://www.aph.gov.au/senate/committee/rrat_ctte/aviation03_draftreg.report/report.pdf)
- 10 Personnel communication, DOTARS.
- 11 The Hon John Anderson MP 'Enhanced aviation security package announced', *Media Release*, 4 December 2004. See:  
[http://www.ministers.dotars.gov.au/ja/releases/2003/december/a155\\_2003.htm](http://www.ministers.dotars.gov.au/ja/releases/2003/december/a155_2003.htm).
- 12 That is, the Secretary of the Department that administers the ATS Act.
- 13 See commentary on **new paragraph 74H(2)(a)** below.
- 14 Existing section 127 of the Act.
- 15 Obviously CASA only receives a copy if the determination is made by the DOTARS Secretary or SES officer.
- 16 See: <http://www.aat.gov.au/ApplyingToTheAAT/SecurityAppeals.htm>
- 17 At p.3.
- 18 *ibid*.
- 19 At. p. 4.
- 20 There are some exceptions.
- 21 That is, the ATS Act as amended by the Bill.
- 22 Presumably this is more likely at smaller rural or regional airports or other aviation facilities.

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